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IN THE

Supreme Court of the United States

October Term, 1958.

No. 476.

GOLDIE B. PRASHKER, Executrix of the Estate of Nathan Prashker, Deceased, and CHOICE EMBROIDERY & LACES, INC.,

Petitioners,

v.

BEECH AIRCRAFT CORPORATION

and

ATLANTIC AVIATION CORPORATION,

Respondents.

BRIEF OF RESPONDENT, ATLANTIC AVIATION CORPORATION, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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November 28, 1958.

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INDEX.

	Page
Matter Omitted (1)(a), (b) and (c)	1
Questions Presented for Review (1)(d)	2
Counterstatement of the Case (1)(e)	3
A. The Facts	3
B. The Petitioners' Charges Against Atlantic	9
Summary of Argument (1)(f)	11
Argument	13
I. When There Is No Issue of Fact to Be Decided by the Jury, the Plaintiff Is Not Entitled to Have His Case Go to the Jury	13
A. The Petitioners' Evidence of "Prior Accidents", Their "Statistics" and Dommasch's Testimony Were Not Offered Against Atlantic	15
B. There Was No Proof of Negligence on the Part of Atlantic	16
1. The Evidence of Failure to Warn, to Which the Petitioners Refer, Was Not Offered Against Atlantic	16
2. There Was No Charge of Negligent Design as Against Atlantic	18
II. The Petitioners Cannot Recover on Negligence Because Prashker Was Guilty of Contributory Negligence	19
A. Prashker Was Negligent in Taking Off in Rain and Mist	19
B. Prashker Was Negligent in Flying to Pittsburgh	20
C. Prashker Was Negligent in Climbing Into the Overcast	21

INDEX (Continued).

Page

III. There Was No Proof of Breach by Atlantic of an Implied Warranty 22

A. The Petitioners Did Not Argue Below That, Because of a Breach of Warranty by Atlantic, There Could Be a Recovery for Prashker's Death 22

B. Choice Did Not Prove a Breach of an Implied Warranty of Merchantability 23

C. Choice Cannot Recover on Warranty Because It Continued to Use the Plane After It Knew of the Alleged Defect in the Plane 24

D. Choice Cannot Recover on Warranty Because It Gave Atlantic No Notice of Breach of Warranty 25

E. Choice Cannot Recover on Warranty Because It Proved No Damages as a Result of Breach of Warranty 26

F. Choice Cannot Recover for Breach of Warranty Because Prashker's Negligence Caused the Accident 27

CONCLUSION 29

APPENDIX 31

Excerpts From Petitioners' First Brief in the Court of Appeals 31

Excerpt From Petitioners' Reply Brief in the Court of Appeals 31

TABLE OF CASES CITED.

Page

Affiliated Enterprises v. Waller, 1 Terry 28, 5 A. 2d 257 (Del. Super. 1939) 20

Cavenaugh v. F. W. Woolworth Co., 308 Mass. 423, 32 N. E. 2d 256 (1941) 24

Columbus Axle Co. v. American Automobile Co., 63 F. 2d 200 (C. C. A. 6, 1933) 20

Cook v. Rice, 135 N. J. L. 240, 61 A. 2d 428 (Sup. N. J. 1947) 27

DiRose v. Hunter Lindsay Corp., 41 N. J. Super. 17, 124 A. 2d 349 (App. Div. 1956) 27

Duncan v. Juman, 25 N. J. Super. 330, 96 A. 2d 415 (1953) .. 23

Earll v. Wichser, 346 Pa. 357, 30 A. 2d 803 (1943) 22

Goff v. Borough of College Hill, 299 Pa. 198, 149 A. 477 (Sup. 1930) 21

Good v. City of Pittsburgh, 382 Pa. 255, 114 A. 2d 101 (1955) 22

Hall v. Ziegler, 361 Pa. 228, 64 A. 2d 767 (1949) 22

Heath v. Channel Lumber Co., 25 N. J. Super. 6, 95 A. 425 (App. Div. 1953) 27

Herron v. Southern Pac. Co., 283 U. S. 91, 51 S. Ct. 383, 75 L. Ed. 857 (1931) 13

Hintz v. Roberts, 98 N. J. L. 768, 121 A. 711 (E. & A. 1923) 27

Johnson v. Hoffman, 7 N. J. L. 123, 80 A. 3d 824 (Sup. 1951) 25

Landers v. Safeway Stores, 172 Ore. 116, 139 P. 2d 788 (1943) 23

McDonald v. Ferrebee, 366 Pa. 543, 79 A. 2d 232 (1951) ... 21

Marko v. Sears, Roebuck & Co., 24 N. J. Super. 245, 94 A. 2d 348 (1952) 24

Miller v. Borough of Exeter, 366 Pa. 336, 77 A. 2d 395 (1951) 22

Parisi v. Friedman, 134 N. J. L. 273, 46 A. 2d 808 (E. & A. 1946) 27

Peterson, In re, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919 (1919) 13

TABLE OF CASES CITED (Continued).

	Page
Pollock v. Philadelphia Rapid Transit Co., 139 Pa. Super. 256, 11 A. 2d 665 (1940)	22
Rank v. Met. Ed. Co., 370 Pa. 107, 87 A. 2d 198 (Sup. 1952)	22
Spence v. Waters, 9 W. W. Harr. 582, 4 A. 2d 142 (Del. Super. 1938)	20
St. George v. Grisafe, 38 N. J. Super. 297, 118 A. 2d 835 (App. Div. 1955)	27
Texas Motorcoaches v. A. C. F. Motors Co., 154 F. 2d 91 (C. C. A. 3, 1946)	25
Tomey v. West Penn. Ry. Co., 300 Pa. 189, 150 A. 612 (1930)	22
Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949)	13
Zotter v. Lehigh Valley R. R. Co., 280 Pa. 14, 124 A. 284 (Sup. 1924)	22

STATUTES AND AUTHORITIES CITED.

	Page
77 C. J. S. 1336, Sales	24, 27
Uniform Sales Act, Section 13	23
Uniform Sales Act, Section 49	11, 25, 26
Williston, Sales, Sec. 207	24

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MATTER OMITTED (1)(a), (b) and (c).

A reference to the official and unofficial reports of the opinion delivered by the court below, the grounds of jurisdiction of this Court advanced by the petitioners and the constitutional provisions supposedly involved are omitted pursuant to Rule 40(1), (2) and (3).

QUESTIONS PRESENTED FOR REVIEW (1)(d).

I. Was there any proof of the negligence charged against Atlantic?

II. Was there any proof by the petitioners, which would entitle them to recover on breach of warranty on the part of Atlantic?

III. Did the petitioners' evidence affirmatively show contributory negligence on the part of Prashker?

IV. When there has been failure to prove plaintiff's charges of negligence and breach of warranty against one of two defendants and there has been affirmative evidence of negligence on the part of a person, whose negligence is imputable to the plaintiff, has the plaintiff been denied his right to trial by jury as against that defendant when the trial court directs a verdict for that defendant and the Court of Appeals affirms?

COUNTER STATEMENT OF THE CASE (1)(e).

A. The Facts.

Atlantic does not agree with the petitioners' statement of the facts.

A commercial airplane is essentially a compromise (8b, 30b, 32b, 35b). It must be light enough to get off the ground; therefore the strength of its parts must be designed with this requirement in mind. On the other hand it must be strong enough to withstand stresses up to a predetermined limit; therefore, its parts must be designed to withstand such stresses. Again, the plane must not only be light enough to get itself off the ground; in addition, it must be able to carry enough of a load to make it a practical means of getting from one place to another (30b); therefore, the plane's ability to carry not only itself but a "pay load" must enter into the design of the plane. The plane must also be able to get from one place to another at such a speed that it is attractive in comparison with other forms of conveyance. Speed is mainly, though not entirely, a function of the plane's power plant; therefore, the requirements of the engine must be balanced with the plane's other requirements. The result is that a plane

1. The deceased, Nathan Prashker, will be referred to as Prashker; the petitioner, Choice Embroidery & Laces, Inc., as Choice; the respondents, Beech Aircraft Corporation as Beech and Atlantic Aviation Corporation as Atlantic; pages of the petitioners' appendices in the Court of Appeals thus: 40a; of Atlantic's 40b; of Beech's 40c; of the petitioner's first brief in the Court of Appeals (1 PB 45); of the petitioners' second brief in the Court of Appeals (2 PB 45); of the petition for writ of certiorari (PP cert. 40); the Civil Aeronautics Board as the CAB, the Civil Aeronautics Authority as the CAA; the Civil Air Regulations, promulgated by the latter, as the CAR's; "Visual Flight Rules", the regulations for flying when the pilot has a visual point of reference outside the plane, as VFR; "Instrument Flight Rules", the regulations for flying when the pilot has no such visual point of reference, IFR. In quotations, italics and matter in parentheses are added unless otherwise noted.

is a compromise between the requirements of all the factors, which go into its design and manufacture. As the petitioners admitted in their opening, no plane can be designed which cannot be torn apart in the air by the forces of nature, to which the plane is exposed in flight, or by abuse on the pilot's part (8b, 23b, 29b, 31b, 35b).[2]

The Government has not been satisfied to let free play between "Let the buyer beware" and implied warranties, imposed on the seller by law, determine what planes may be sold or flown. Consequently, Congress has established two agencies, the CAB and the CAA, 49 U. S. C. 551, 552, which prescribe standards, CAR's, for the examination of the characteristics of every type of plane, which it is proposed to manufacture; if the type passes the CAA's rigorous requirements, a type certificate is issued (81b, 82a, 82b, 83b). Such a type certificate is issued for the Beechcraft Model D-35, one of which is involved in this action (124b). Then every plane is individually tested. The very plane, in which Prashker crashed, was tested by the CAA and a certificate was issued that it was "airworthy", i.e., met the requirements of the CAB and was fit to fly (82b).

The CAR's also prescribe standards for the qualification of pilots and for their conduct.

The plane involved was sold new by the respondent, Beech, the manufacturer, to the respondent, Atlantic, the distributor, in Kansas, flown to New Jersey, where it was used by Atlantic as a demonstrator or for similar purposes until July 21, 1953 (23a) when it had about fifty hours flying time on it (3b). On that date, it was sold in New Jersey by Atlantic to Choice and, after the sale, was flown for another fifty hours by at least three pilots.

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2. The petitioners refer (PP cert. 10) critically to the Court of Appeals' statement that a plane may come apart in the air "because of the compromise required in designing an aircraft which will get off the ground". The petitioners said substantially the same thing in their opening to the jury (8b).

Prashker, the deceased, his brother, Harold Prashker (14a) and Gorski (51b), the proprietor of the field where Choice had kept its other planes and kept the Bonanza until the date of the crash, October 5, 1953.

Prashker had a VFR license; he did not have an IFR license and never had such a license (8a). Under the CAR's, he was under a duty to keep five hundred feet above clouds, a thousand feet under clouds and two thousand feet away from them horizontally (47a); he was under a duty to keep out of instrument conditions, conditions where he had no visual point of reference, i.e., where by the use of his eyes, looking outside the plane, he could not see whether he was flying straight and level, climbing, diving or turning right or left (94b).

It is difficult for a person, who has never piloted a plane, to realize that, when a pilot is in instrument conditions, the only thing he sees ahead of him, on each side, below and above him, is a uniform mass of gray; thus he cannot tell from what he sees whether he is flying straight and level, climbing into a stall, diving toward the earth or unconsciously turning left or right into what becomes the "graveyard spiral" (38b, 94b). The only way he can tell what he is doing is by disregarding everything but his instruments. But flying on instruments is a delicate operation, requiring rigorous training and continuous practice (18a, 19b, 32b). Prashker had neither training nor practice (18a, 19a) as an instrument pilot.

If a pilot, not qualified to fly on instruments, permits himself to get involved in instrument weather, the almost certain result is death in a matter of minutes for himself and his passengers (33b, 34b, 36b). As Captain Blakemore, a TWA pilot called by the petitioners, said, "Only a miracle can save him" (46a).

Prashker knew these facts before he bought the Bonanza; any pilot would know them (17b, 19b, 20b, 21b, 23b, 24b, 25b, 26b, 28b, 29b, 30b, 31b, 32b, 37b, 38b, 39b, 42b, 43b, 44b). They were reiterated in the literature, which

was furnished him with the Bonanza and which Prashker read and discussed with his brother (17b, 19b, 20b, 21b, 22b, 23b, 24b, 29b, 31b, 32b, 35b, 36b, 37b, 38b, 39b, 41b, 42b, 43b).

Prashker was aware of the supposed directional lateral oscillation of the Bonanza (wiggle in the tail), of which the petitioners complain, before he bought the plane; his reaction to his brother's calling his attention to this supposed characteristic was that that was inherent in the plane, there was nothing to be done about it or words to that effect and he continued to fly the plane (20a, 48b, 51b).

Prashker was not an inexperienced pilot; he, a friend of his, his brother and Choice had owned four planes, including the Bonanza, over a period of two years (113b). It is not clear exactly how the title to these planes had been held (45b) but that is immaterial. In any case, Prashker had flown them all (51b). The sequence had been an Aeronca, a Stinson, a Navion and finally the Bonanza (10b), a progression from slower to faster, "cleaner"[3] planes (18b). Prashker had flown more than 215 hours, in all the types of planes he had piloted (113b, 8a); he had taken courses in flying at New York University (10a). He had flown the Bonanza at least nineteen times, seventeen of which are logged, to which should be added the flight from New Jersey to Pittsburgh on October 3 and around Pittsburgh on October 4, 1953, the day before the crash, which are not logged (113b).

On October 5, 1953, at 12:09 P. M., Prashker, the president of Choice (5a), took off on company business with a passenger from Allegheny County Airport, southeast of Pittsburgh, northwest toward Cleveland on a VFR plan at a height of three thousand feet above sea level (75a). The VFR's prescribed that the minimums for take-off should be a thousand feet ceiling above the ground, not above sea

3. "Clean" in airplane jargon means a fast, streamlined plane with a low amount of drag (18b).

level (42a), and forward visibility of three miles (41a). When Prashker took off, the ceiling at Allegheny was "estimated" (304a) to be eighteen hundred feet above the ground and the visibility was four miles (304a). There was haze and light rain. The temperature was fifty, the dew point forty-eight (304a). When the temperature and dew point are close together, such a condition is an indication that fog, rain or changing weather conditions may be anticipated (122c). The take-off was uneventful and the Bonanza was last seen from the Allegheny tower about three miles out and on a direct course toward Cleveland (308a). The course, which Prashker had taken, took him directly over Pittsburgh, where the visibility was apt to be lessened by smoke from the industrial concentration there (43a). On leaving, he was warned about flying over Pittsburgh (310a).

Nothing more was heard from the plane until 12:22; the conversation between the tower and Prashker from 12:22 until 12:26 appears in full in the incident report. From the tone of Prashker's voice and the profane and filthy language, which he used, it is obvious that he was in panic and had lost control of himself (310a, 311a).

The statement of the Controller in the Allegheny Tower gives a dramatic account of what happened (309a-312a):

"Statement of Controller, Local Control and Approach Control Positions

1207 E Bonanza N2168D called Allegheny Tower by radio and requested taxi and take off instructions. I cleared Bonanza 68D to taxi Runway 5 or 30, pilot's choice, wind North 10 to 15 and altimeter 30.00. Bonanza 68D asked for Runway 30 and for detailed instructions as he was unfamiliar with the field. I issued detailed instructions to Bonanza 68D. Controller Armstr[illegible] who was working the Flight Data Position, required me to find out if N68D would close his flight plan with Cleveland Radio. I requested this in-

formation from N68D and the pilot advised that he would close with Cleveland Radio.

1209E Bonanza 68D requested take-off clearance and I cleared him for take-off on Runway 30. The take-off appeared normal in all respects. The aircraft was last observed on a straight out departure about 3 miles Northwest of the field and I advised him to use caution passing through the Greater Pittsburgh area as they have considerable instrument traffic.

1222E to 1226E Bonanza 68D called Allegheny Tower and advised that he was over the city at 2800 feet, unable to maintain VFR and was climbing to get on top. I advised N68D that the last tops we had were 3800 feet and suggested that if he was climbing to remain well clear of all airways or get an ATC clearance. The pilot advised that he was already in the G—D—— stuff and was climbing. Controller Armstrong advised me that Greater Pittsburgh Tower advised that a Jet reported the tops at 33,000 feet and they had nothing on inbetween layers. I relayed this to N68D, I then requested the approximate position that N68D was climbing up and he replied that he did not know his position. I then requested of the pilot if he desired to return to the airport, to which the pilot replied that he would, but did not know where he was except that he had entered the G—Dam— stuff over the city. I asked N68D if he was capable of flying instruments and the pilot replied that he was not qualified. I then asked N68D if he was VFR and the pilot replied NO, I cannot see a G— D— thing in this s— —, Controller Armstrong advised me to have the pilot count for a DF steer for Pittsburgh Tower. I did and the pilot counted. Controller Armstrong advised me that Pittsburgh Tower said to steer 325 degrees magnetic. I relayed this heading to N68D. I heard a carrier signal on the radio and then a very crackly voice first which was barely dis-

tinguishable and then 2 5. I repeated the steer, but received no acknowledgment. I transmitted to N2168D on all available frequencies in an attempt to reestablish contact with the aircraft but was unsuccessful.

1228E Controller Armstrong answered the outside telephone and then advised me that a Mrs. Fine reported seeing an aircraft go down between Elizabeth and Monongahela.

* * *

From the pilot's conversation it was very evident that he was excited and under considerable pressure after he advised that he was in the overcast and throughout the short period that we had radio contact with him.

IVAN L. MCCAFFERTY
Ivan L. McCafferty
Airway Operation Specialist.

The plane crashed about eight miles south and slightly east of Allegheny (63a, 76a). The course of the plane just prior to the crash was from northwest to southeast (59a).

The Bonanza had retractable landing gear. Before getting into overcast, a pilot should slow his speed and drop his flaps and landing gear, to provide drag for the plane (25b), which makes it more stable and easier to manage. Prashker had dropped neither landing gear nor flaps (73b).

A wing and a stabilizer had come off the plane under positive, i.e., upward, pressure (61a, 72b, 76b).

The petitioners did not charge that the wing and stabilizer came off because any of the parts of the plane were defective (8b).

At the time of the crash, the plane had been flown a little more than one hundred hours (75b).

B. The Petitioners' Charges Against Atlantic.

It must be borne in mind (1) that the charges against the two respondents were different and (2) that the im-

portant evidence offered against Beech was not offered against Atlantic. The petitioners in their petition neglect to point out these two fundamental facts.

There were only two charges against Atlantic (PP cert. 3a):

(1) Breach of an implied warranty of merchantability.

(2) Negligent failure to warn of known dangerous propensities of the plane.

There were six charges against Beech (PP cert. 3a):

(1) Improper design.

(2) Failure to change design after notice of improper design.

(3) Failure to include necessary safety devices.

(4) Failure to warn of prospective dangers.

(5) A conscious policy on the part of Beech to disseminate false information as to the strength and safety of the Bonanza.

(6) Breach of warranty.

SUMMARY OF ARGUMENT (1)(f)

I. The Prashker estate cannot recover against Atlantic for negligence because there was no proof of negligence on the part of Atlantic. The petitioners' important evidence on negligence was not offered against Atlantic. The statistics as to Bonanza failures compared with failures of other planes, the reports of Beech's investigations of prior accidents and the testimony of the petitioners' expert, Dommasch, were offered only against Beech.

II. Choice cannot recover from Atlantic for breach of an implied warranty of merchantability because there was no proof that the plane was not merchantable. In fact, the proof was that the plane was merchantable, i.e., fit to fly. The plane had been flown fifty hours by Atlantic and about fifty hours by Prashker and his associates, all without any trouble; it was only when the pilot became involved in weather, in which he was incompetent to fly, that there was any trouble. In addition, the model had been tested and certified by the CAB; the very plane involved had been tested and certified by the CAB as airworthy.

III. Choice cannot recover from Atlantic on warranty because it knew of the tail wiggle, the alleged defect in the plane, when it bought the plane on July 21, 1953. Nevertheless, it continued to use the plane until the crash on October 5, 1953.

IV. Choice cannot recover from Atlantic on warranty because it gave Atlantic no notice of breach of warranty. Under Section 49 of the Uniform Sales Act, notice of a claimed breach of warranty must be given promptly. Although Choice knew of the supposed breach of warranty on July 21, 1953, when it bought the plane, Choice gave no notice of a claim for breach of warranty until it brought this suit on September 29, 1954.

V. Choice cannot recover from Atlantic on warranty because it proved no damage for breach of warranty. The damage Choice proved was the difference in value of the plane when it was bought and its value after the crash, when it had been totally destroyed. But under the Uniform Act, damages for breach of warranty are the difference between the value of the thing as it actually was and the value it would have had if it had corresponded to the warranty.

VI. Prashker's estate cannot recover against Atlantic on negligence because Prashker was negligent (1) in taking off, when he was not qualified to fly on intruments and when, at the place of take-off, there was mist, it was raining and the temperature and dew point indicated that the weather would get worse; (2) in flying over Pittsburgh in view of the probability of smoke in that highly industrial area; (3) in failing to turn around when he saw or should have seen the overcast ahead of him and when, instead of turning around, he climbed into the overcast "to get on top" (310a).

VII. Choice cannot recover property damage for breach of warranty since the damage to the plane was due to the negligence of Choice's president Prashker who was using the plane on company business.

VIII. A plaintiff has not been denied his right to trial by jury if the trial court, at the conclusion of the plaintiff's case, directs a verdict for the defendant either (1) because the plaintiff has failed to prove his case or (2) because, in the proof of his case, it affirmatively appears that he is not entitled to recover. In this case, there was complete failure by the petitioners to prove (1) the only negligence charged against this respondent, that it failed to warn of the dangerous characteristics of the Bonanza after it was aware of them or (2) breach of warranty of merchantability. In addition, it affirmatively appeared that the accident was due to Prashker's negligence.

Argument.

I. WHEN THERE IS NO ISSUE OF FACT TO BE DECIDED BY THE JURY, THE PLAINTIFF IS NOT ENTITLED TO HAVE HIS CASE GO TO THE JURY.

In the absence of issues raised by the evidence or permissible inferences from the evidence, the plaintiff has no right to trial by jury and "the judge has the right to direct a verdict for the defendant" (Mr. Chief Justice Hughes in *Herron v. Southern Pac. Co.*, 1931, 283 U. S. 91, 51 S. Ct. 383, 75 L. Ed. 857).

In re Peterson, 1919, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919:

> "No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined."

Wilkerson v. McCarthy, 1949, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (Mr. Justice Frankfurter concurring):

> "It is an important element of trial by jury which puts upon the judge the exacting duty of determining whether there is solid evidence on which a jury's verdict could be fairly based."

Consequently, in order to determine whether the petitioners were entitled to trial by jury as against Atlantic and were deprived of it by the district court, the evidence offered against Atlantic must be examined.

The evidence, both that admitted and excluded, on the issue of negligence, which the petitioners say should have been submitted to the jury, was not offered against Atlantic.

The petitioners' main case was against Beech, the manufacturer. In his opening to the jury, the petitioners' attorney said (5b):

"We are suing two defendants in this case, Beech Aircraft Corporation, the principal defendant, and Atlantic Aviation Corporation, which sold the airplane.

I would like to tell you what our allegations are, what our claims are against both defendants, and I think it would be simpler if I start with Atlantic, since the case against Atlantic is far simpler, far less conclusive than our case against Beech."

The petitioners say here:

"The principal basis for petitioners' claims was evidence of the prior accidents and statistical comparison of failure mentioned above. Aside from being the most important proof of notice to Beech, it was the basis for expert testimony (by the petitioners' expert, Dommasch) that the cause of the Prashker accident lay in the characteristics of the Bonanza * * *." (PP cert. 6)

"The *principal* (italics in petitioners' text) allegation petitioners made was that Beech failed to give necessary warnings of a danger and propensity for structural failure in the Bonanza * * *." (PP cert. 19)

In their petition, the petitioners refer no less than thirty times to the statistics, evidence of other accidents and Dommasch's testimony (PP cert. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 12, 13, 14, 15, 18, 19, 21, 25, 26, 28).

Finally the petitioners conclude their petition (PP cert. 28) by saying, with reference to statistics and reports of other accidents (PP cert. 11a):

"If the right of jury trial is to be guarded against the errosive (sic) effect of labeling obviously admissible evidence 'irrelevant' * * *."

Thus it appears that the petitioners' real complaint is (1) the exclusion of the statistical evidence, (2) the exclusion of the evidence of other accidents, and (3) that

Dommasch's testimony was enough to present a jury question.

A. The Petitioners' Evidence of "Prior Accidents", Their "Statistics" and Dommasch's Testimony Were Not Offered Against Atlantic.

The petitioners refer here, usually without distinction, to "the respondents", although the charges against each were different and the petitioners' important evidence, according to their own evaluation of it was not offered against Atlantic (e.g., PP cert. 10, 13, 19, 26, 27).[4]

The petitioners complain (PP cert. 10) about the exclusion by the trial court of evidence of prior accidents as irrelevant. They say (PP cert. 11):

> "Indeed, these reports of other accidents were more than relevant to the issue of causation. They were necessary! Asked 'what material do you as an engineer require to analyze the Prashker accident and come to a conclusion on the cause of the Prashker accident,' Mr. Dommasch replied 'a study of similar circumstances or similar occurrences if they exist' (170a). He added, 'this is an essential ingredient to my analysis of the Prashker accident' (171a)."

But the evidence of prior accidents was not offered against Atlantic (87b, 88b, 89b, 95b, 98b, 102b, 103b).

The petitioners complain (PP cert. 13) about the exclusion of statistics offered by them (PP cert. 15):

> "This evidence (the statistics) was probative of the questions of negligence, causation, and contributory negligence, since it demonstrated that it was the airplane and not the pilots that *caused* these accidents,

4. Probably the most striking example of the petitioners' confusion of the two respondents is when they say that the action was brought for "* * * punitive * * * damages against the respondents, the manufacturer and distributor of the airplane (PP cert. 5). The claim for punitive damages was asserted only against Beech (PP cert. 9, 4a).

and since it furnished the basis for expert proof to the same effect. The effect of its shocking exclusion was to deny petitioners their constitutional right to trial by jury." (Italics in text.)

But the statistics were not offered against Atlantic (89b, 179a, 180a, 182a, 183a).

The petitioners say (PP cert. 10) that the court below "ignored the direct testimony * * * of a man whose life work has been devoted to aircraft design (see Dommasch testimony * * *)."

But Dommasch's testimony was not offered against Atlantic (99b, 100b, 103b).

Thus, the three substantial grounds of the petitioners' complaint here are not available against this respondent because the evidence, to which the petitioners refer as creating a jury issue, was not offered against it.

B. There Was No Proof of Negligence on the Part of Atlantic.[5]

The petitioners say (PP cert. 19) that they proved negligence in (1) failure to warn and (2) negligent design.

1. The Evidence of failure to warn, to which the petitioners refer, was not offered against Atlantic.

As to failure to warn, the petitioners commence their argument (PP cert. 19):

> "The *principal* allegation petitioners made was that Beech failed to give necessary warnings of a danger and propensity for structural failure in the Bonanza. The District Court admitted proof of seven prior Bonanza structural failure accidents on the limited issue of notice. It further admitted expert testimony that these reports gave notice of a danger.

5. The heading in the petitioners' petition (PP cert. 18) is: "Failure to prove Negligence and Breach of Warranty". However, there is no reference, whatever, in the following argument to any supposed breach of warranty by Atlantic.

or accident propensity in the Bonanza (248a-251a, 271a, 272a)." (Italics in text)

As already pointed out, the evidence of prior accidents was offered against Beech only (87b, 88b, 89b, 95b, 98b, 102b).

Obviously the petitioners' complaint is against Beech, not against Atlantic.

The petitioners again refer repeatedly to Dommasch's testimony (PP cert. 19). The petitioners fail to point out that Dommasch's testimony was not offered against Atlantic (99b, 100b, 103b).

The petitioners refer (PP cert. 20) to two Beech reports (PX 72 and PX 42) and another report on the Bonanza (PX 22) and say that "the petitioners far exceeded the minimum requirements of proof of negligence" (PP cert. 18).

The petitioners again neglect to point out that these exhibits were not offered against Atlantic on negligence. The petitioners said in their second brief in the Court of Appeals (appendix to this brief):

> "Plaintiffs also offered two engineering reports concerning the Bonanza, prepared by Beech, and one engineering report prepared by the National Advisory Committee for Aeronautics against Atlantic (PX 22, PX 42, PX 72). Plaintiffs conceded that Atlantic had not received or seen these reports prior to the time of the Prashker accident and that they were not admissible on the claims against Atlantic based upon negligence. They offered the reports on the claims for breach of warranty . . . ."

The petitioners refer to Gordon's testimony (PP cert. 20). It was not offered against Atlantic (88b).

Thus, all the evidence, which the petitioners now say proved negligent failure to warn, was not even offered against Atlantic at all or was not offered on this issue.

2. There was no charge of negligent design as against Atlantic.

The petitioners, in their opening to the jury, stated (6b) their charges against the respondents. The charge of negligent design was made against Beech only:

> "Against Beech we really make five allegations of negligence and some allegations of more than negligence. We say first that this airplane is improperly designed, that it was improperly designed in its inception."

The Court of Appeals correctly stated the petitioners' charges (PP cert. 3a):

> "* * * Four allegations of negligence are made against Beech: (1) that the airplane was improperly designed, * * *."

The petitioners, in their present argument (PP cert. 22-24), again fail even to suggest that their charge of negligent design does not affect Atlantic.

* * *

To summarize the point, the petitioners say that they have been deprived of their right to trial by jury because they had made out a prima facie case of negligence (1) by their evidence of former accidents, (2) by the statistics as to comparative rates of failure of supposedly similar planes, (3) by the testimony of Dommasch, (4) by PX 22, PX 42 and PX 72 and (5) by proof of negligent design. As to the first three bases of their motion, that evidence was not offered against Atlantic at all; as to the fourth basis of their motion, the three enumerated exhibits were not offered against Atlantic on the issue of negligence; as to defective design, that charge was directed at Beech alone.

Consequently, so far as Atlantic is concerned, there is nothing, on which the petitioners' argument, that they have been deprived of a jury trial, rests.

As a result, Atlantic will not discuss the cases cited by the petitioners (PP cert. 24) on this point.

So far as Atlantic is concerned, the courts below did not err in refusing a jury trial on negligence because the evidence, which the petitioners say entitled them to a jury trial, was not offered against Atlantic.

II. THE PETITIONERS CANNOT RECOVER ON NEGLIGENCE BECAUSE PRASHKER WAS GUILTY OF CONTRIBUTORY NEGLIGENCE.

Atlantic will assume for the moment and contrary to the fact that the evidence, offered against Beech alone, had been offered against Atlantic. Even on that unwarranted assumption, the petitioners could not recover because of Prashker's contributory negligence.

Atlantic suggests that Prashker was negligent in three respects.

First, he took off in the face of bad weather.

Second, he continued to fly directly toward the overcast above Pittsburgh.

Third, he climbed up into the overcast.

A. Prashker Was Negligent in Taking Off in Rain and Mist.

When Prashker took off he had an 1800 ceiling estimated; the minimum ceiling permitted for a take-off is a thousand feet and a "ceiling" may not be flat; it may have downward projections of five hundred feet (44a).

When Prashker took off, there was light rain and haze; the temperature was fifty, the dew point forty-eight (499); such a situation is an indication that fog, rain or changing weather conditions may be anticipated (122c).

When Prashker took off he had horizontal visibility of four miles; the minimum is three miles.

However, the existence of the minimum ceiling and visibility, like a green light for an automobile, is not a command to go (*Spence v. Waters*, 9 W. W. Harr. 582, 4 A. 2d 142, Del. Super. 1938). "There are many times when it is unsafe for a non-instrument pilot to use the minimums * * *" (Blakemore 45a).

It was negligent for Prashker, a non-instrument pilot, to take off at all when the weather was bad with the prospect of deterioration and when there was already a haze and it was raining (304a).

B. Prashker Was Negligent in Flying Over Pittsburgh.

Prashker was negligent in flying directly over Pittsburgh. Atlantic believes that the Court could take judicial notice of the atmospheric conditions over and around the "Smoky City" (45a; *Affiliated Enterprises v. Waller*, 1 Terry 28, 5 A. 2d 257, Del. Super. 1939). Certainly Prashker, who had gone to college in Pittsburgh (21a), who claimed Pittsburgh as his residence (11b) and who had piloted his own planes into Pittsburgh seven times, must have been aware of this fact (113b). But it is not necessary for the Court to go outside the record.

Prashker was specifically warned by the danger of flying over Pittsburgh even after he left the field (310a).

Captain Blakemore, a TWA pilot, thought a prudent person would consider the possibility of smoke or smog over Pittsburgh and was positive (1) that a prudent person would consider that fact in making his plans and (2) that a pilot, leaving Allegheny VFR and flying toward Pittsburgh, where there was instrument weather, would have been aware of the IFR weather ahead of him in time to have avoided it (45a, 46a).

Prashker was negligent both in flying toward Pittsburgh instead of skirting the smoke and fog over the city and in not turning back when he saw or should have seen the instrument weather ahead of him.

C. Prashker Was Negligent in Climbing Into the Overcast.

Prashker at 12:22 first stated that he was over the city, unable to maintain VFR and was climbing to get on top of the overcast. After the reply of the tower, telling him to keep clear of airways or get a clearance, Prashker said that he was "already in the —— —— stuff and was climbing." Prashker was dead in about two minutes.

Prashker was negligent in climbing into the overcast when he saw that he could not maintain his visual contact with the ground.

The warning he had received (169c) comes back to mind:

> "ALL THAT WE CAN DO IS TO REPEAT OUR WARNING THAT FLIGHT UNDER INSTRUMENT CONDITIONS BY UNTRAINED OR OUT-OF-PRACTICE PILOTS IS ENORMOUSLY HAZARDOUS AND THAT THE PENALTY FOR THIS TRANSGRESSION OF THE CAA REGULATIONS, AND THE LAWS OF NATURE, IS OFTEN DEATH, NOT ONLY FOR THE TRANSGRESSOR, BUT ALSO FOR HIS FRIENDS WHO ARE WITH HIM." (Emphasis in text).

Prashker ignored the repeated warnings in the literature which he had read and studied (20b-43b); as a result he and his friend paid the ultimate price for his recklessness.

The CAR's are to the effect that a VFR pilot shall stay five hundred feet away from clouds vertically and one thousand feet horizontally. Here there can be no question but that the decision of Prashker to "climb up to get on top" was the cause of his getting lost, losing control of himself, of his plane and crashing (312a).

Any negligence on the part of the plaintiff, however slight, bars his recovery (*Goff v. Borough of College Hill*, 299 Pa. 148, 149 A. 477, 1930, *McDonald v. Ferrebee*, 366 Pa. 543, 79 A. 2d 232, 1951.

One, who fails to use his senses to avoid an apparent dangerous situation, is guilty of negligence as a matter of law (*Miller v. Borough of Exeter*, 366 Pa. 336, 77 A. 2d 395, 1951).

Contributory negligence may consist of careless exposure of one's self to danger or failure to exercise reasonable diligence for one's own protection (*Good v. City of Pittsburgh*, 382 Pa. 255, 114 A. 2d 101, 1955).

One who voluntarily puts himself in a position of danger and injury results is guilty of contributory negligence (*Pollack v. Philadelphia Rapid Transit Co.*, 139 Pa. Super. 256, 11 A. 2d 665, 1940; *Earll v. Wickser*, 346 Pa. 357, 30 A. 2d 863, 1943; *Hall v. Ziegler*, 361 Pa. 228, 64 A. 2d 767, 1949; *Tomey v. West Penn. Ry. Co.*, 300 Pa. 189, 150 A. 612, 1930).

The petitioners say that there is a very strong presumption that the pilot exercised due care for his own safety (PP. cert. 17). There is a presumption of due care on the part of a deceased only when the circumstances surrounding the fatal accident are unknown. (*Rank v. Met. Ed. Co.*, 370 Pa. 107, 87 A. 2d 198, 1952; *Zotter v. Lehigh Valley R. R. Co.*, 280 Pa. 14, 124 A. 284, 1924).

Prashker's negligence in the three enumerated respects prevents recovery by the plaintiffs. There is no presumption of due care on Prashker's part in the face of the direct affirmative evidence as to what he did.

III. THERE WAS NO PROOF OF BREACH BY ATLANTIC OF AN IMPLIED WARRANTY.

The petitioners do not discuss this point in their petition here.

A. The Petitioners Did Not Argue Below That, Because of a Breach of Warranty by Atlantic, There Could Be a Recovery for Prashker's Death.

It is agreed that New Jersey law is applicable (PP cert. 9a).

Choice, not Prashker, bought the plane from Atlantic (12b). Therefore, under New Jersey law, only Choice, the party to the contract of sale, can recover on any warranty (*Duncan v. Juman*, 25 N. J. Super. 330, 96 A. 2d 415, 1953). The petitioners did not argue below (appendix to this brief) that Prashker's estate could recover on breach of warranty from Atlantic for Prashker's death. Choice, not the Prashker estate, sued Atlantic for breach of warranty. Choice's only claim for breach of warranty was for property damage.

B. Choice Did Not Prove a Breach of an Implied Warranty of Merchantability.

The petitioners do not discuss this point.

Under Section 13 of the Uniform Sales Act, which is in force in New Jersey, the only warranty was a warranty of merchantability, that is, that the plane was reasonably fit for the general purpose for which it was sold (Petitioners' opening to jury, 5b).

Atlantic suggests that the fact that the plane had been flown for a hundred hours by a number of pilots without any trouble demonstrates that the plane was in fact merchantable, i.e., fit to fly.

In addition, the CAA's certification of the type and of the actual plane involved (82b) is evidence that the plane was reasonably fit for flying, the purpose for which it was sold. No evidence was offered against Atlantic, which put in issue the effect of these certificates, introduced by the petitioners themselves that the certification of the Choice plane, that it was "airworthy", is a finding that it is "fit to fly", exactly as "seaworthy" means "fit for a voyage" (Webster).

This was not a res ipsa loquitur situation: the petitioners did not depend on res ipsa (1b) and the doctrine does not apply to a breach of warranty (*Landers v. Safeway Stores*, 172 Ore. 116, 139 P. 2d 788, 1943).

Neither does a warranty make the warrantor an insurer (*Cavenaugh v. F. W. Woolworth Co.*, 308 Mass. 423, 32 N. E. 2d 256, 1941).

There has been no showing that the Choice Bonanza was not reasonably fit for the general purpose for which it was sold. The only showing against Atlantic that the plane was not fit to fly is that this plane was torn to pieces after the pilot lost control of himself and of the plane when he started to climb through the overcast in violation of CAR's (309a-312a) and without regard to the peril of imminent death, which he knew such action involved and of which he had been repeatedly warned (169c).

Choice cannot recover for breach of an implied warranty of merchantability because there was no showing, as against Atlantic, that the plane was not fit to fly.

C. Choice Cannot Recover on Warranty Because It Continued to Use the Plane After It Knew of the Alleged Defect in the Plane.

The petitioners do not discuss this point.

Prashker was president of Choice and was on company business when he crashed (5a, 52b). Consequently Prashker's negligence was imputable to Choice.

A warrantee cannot recover if he continues to use the warranted thing after he knows it is unsafe (*Marko v. Sears, Roebuck & Co.*, 24 N. J. Super. 245, 94 A. 2d 348, 1952). WILLISTON SALES, Sec. 207 and 77 C. J. S. 1336, Sales, are to the same effect.

When Choice bought the plane, it was aware of the directional lateral oscillation (tail wiggle), which is supposed to constitute the breach of warranty (20a, 12b, 48b, 51b).

Consequently Choice cannot recover on implied warranty of merchantability because, after it knew of the supposed breach of warranty, it persisted in using the Bonanza.

D. Choice Cannot Recover on Warranty Because It Gave Atlantic No Notice of Breach of Warranty.

The petitioners do not discuss this point.

Section 49 of the Uniform Sales Act, which is in force in New Jersey, is as follows:

> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."

Choice's evidence was to the effect that it knew of the supposed defect in the plane, the tail wiggle, or directional lateral oscillation, which is the basis of the supposed breach of warranty, when it bought the plane on July 21, 1953 (12b, 51b). It gave no notice to Atlantic of any supposed breach of warranty from that time until it commenced this suit on September 29, 1954, about fourteen months after the date, on which it had knowledge of the supposed breach of the warranty.

Johnson v. Hoffman, 7 N. J. L. 123, 80 A. 2d 824, 1951, was an action for the price of cattle sold the defendant by the plaintiff. The defendant counterclaimed for breach of warranty but was unable to prove any notice of breach of warranty within a reasonable time. The court said that "where there is no proof of such notice, the Sales Act provides that the Seller shall not be liable" and affirmed the action of the trial court in dismissing the counterclaim.

Texas Motorcoaches v. A. C. F. Motors Co., 154 F. 2d 91 (C. C. A. 3, 1946), involved section 49 of the Uniform Act. Texas sued to recover on a breach of warranty and

recovered. The Court of Appeals reversed because the plaintiff had failed to give the required notice:

> "'The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which rightly or wrongly, the law requires that he shall have early warning (citation) * * *.
>
> Normally, the question of notice is for the jury (citations). However, where the evidence is undisputed and allows one inference only, lack of requisite notice will be determined as a matter of law (citations). Summary judgment on the pleadings will be entered if the facts averred disclose a failure to give requisite timely notice of the breach of warranty as required by section 49 of the Sales Act; Kull v. General Motors Truck Co., 1933, 311 Pa. 580, 166 A. 562."

In the *Kull* case, the Supreme Court of Pennsylvania cited with approval decisions where the courts had held that delays of three months and eight months were too long under section 49 as a matter of law.

Columbus Axle Co. v. American Automobile Co. (C.C.A. 6, 1933), 63 F. 2d 206, is to the same effect and holds that where there is no dispute as to the facts, the question of whether notice was given in a reasonable time is for the court.

There being no question but what no notice of breach of warranty was given until suit was brought, as a matter of law the statute's requirement of notice was not met and Choice's claim based on breach of warranty was properly dismissed.

E. Choice Cannot Recover on Warranty Because It Proved No Damages as a Result of Breach of Warranty.

The petitioners do not discuss this point.

The damages for breach of warranty are the difference between the value of the thing if it had corresponded to the

warranty and its value as it then was at the time of sale (*Cook v. Rice*, 135 N. J. L. 240, 61 A. 2d 428, Sup. N. J. 1947; *DiRose v. Hunter Lindsay Corp.*, 41 N. J. Super. 17, 124 A. 2d 349, App. Div. 1956; *St. George v. Grisafe*, 38 N. J. Super. 297, 118 A. 2d 835, App. Div. 1955).

On the other hand, the damages for property damage as a result of negligence is the difference between the value of the thing before and after the accident (*Hintz v. Roberts*, 98 N. J. L. 768, 121 A. 711, E. & A. 1923; *Parisi v. Friedman*, 134 N. J. L. 273, 46 A. 2d 808, E. & A. 1946).

Choice proved the cost of the plane when bought (12b) and offered evidence, which, it will be assumed, went to show that the plane was a complete loss after the accident (104b).

Choice, therefore, at the most, offered evidence of what its property damage would have been if its action had been based on negligence. It offered no evidence to prove its damage from the breach of warranty, assumed for the moment. Therefore, it cannot recover on breach of warranty.

F. Choice Cannot Recover for Breach of Warranty Because Prashker's Negligence Caused the Accident.

Prashker was president of Choice and was flying the plane on company business (5a, 52b). Consequently his negligence was imputable to Choice.

A warrantee cannot recover if his negligence is the cause of the damage to the thing warranted, for which he sues.

Heath v. Channel Lumber Co., 25 N. J. Super. 6, 95 A. 2d 425 (App. Div. 1953):

> "* * * Assuredly the warranty is not a policy of liability insurance, nor does it purport to indemnify the plaintiff against a liability of the plaintiff incurred by reason of his own carelessness (citations) * * *."

77 C. J. S. 1336 is to the same effect.

In the present case, the evidence, offered by Choice, showed that the negligence of Prashker, Choice's president, caused the damage of which Choice complains, a point already taken up under contributory negligence, above.

* * *

To sum up this point, Choice cannot recover on breach of warranty, not only because:

1. Prashker's negligence caused the damage, for which Choice sued, the reason the District Court specifically stated, but also because:

2. There was no proof of breach of the implied warranty of merchantability, i.e., that the Bonanza was not reasonably suited for the general purpose for which it was sold.

3. Choice persisted in the use of the plane after it knew of the supposed characteristic, which it now claims constituted a breach of warranty.

4. Choice gave Atlantic no notice of the claimed breach of warranty.

5. Choice offered no proof of its damages as a result of the supposed breach of warranty.

The courts below did not err in dismissing the claim against Atlantic based on breach of warranty.

CONCLUSION.

1. The petitioners fail to point out the differences in their charges, and the evidence offered, against Beech and against Atlantic.

2. The Prashker estate cannot recover from Atlantic for damages for Prashker's death for negligence on the basis of the evidence, to which the petitioners refer in their petition, because that evidence was not offered against Atlantic.

3. Since the evidence to which the petitioners refer in their petition, was not offered by them as against Atlantic to show Atlantic's negligence, no issue as between the petitioners and Atlantic was raised by that evidence. Therefore, the petitioners were not entitled, as against Atlantic, to submission of that evidence to a jury. Consequently, there is no basis for the grant of certiorari so far as Atlantic is concerned.

4. Choice sued Atlantic for property damages only on breach of an implied warranty of merchantability. The Prashker estate did not sue Atlantic for Prashker's death on breach of warranty.

5. Choice cannot recover from Atlantic for property damage on breach of an implied warranty of merchantability because:

(a) Choice did not prove that the plane was not merchantable.

(b) Choice continued to use the plane after it knew of its supposed defect.

(c) Choice gave no notice to Atlantic of the plane's supposed failure to comply with the warranty of merchantability.

(d) Choice proved no damages resulting from breach of warranty.

(e) The negligence of Choice's agent, Prashker, caused the accident.

6. Atlantic asks that, as to it, the petition for certiorari be dismissed.

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November 28, 1958

APPENDIX OF RESPONDENT, ATLANTIC AVIATION CORPORATION.

(Excerpts From Petitioners' First Brief in the Court of Appeals).

9 * * *

"(B) As to breach of warranty:

The plaintiffs asserted claims, based upon breach of warranty, against both defendants. Since the sale of the aircraft from Atlantic to Choice took place in New Jersey, that state's law govern d questions of warranty as between Choice and Atlantic. It was agreed that New Jersey law required privity of contract to support an action for breach of warranty. Thus, the only action asserted at the trial against Atlantic, based upon warranty, was the claim for property damages as a result of loss of the aircraft. * * *"

44 * * * *

"In directing a verdict in favor of the defendant, Atlantic, on the action by Choice based upon breach of warranty for the value of the airplane, the Court said * * *."

(Excerpt From Petitioners' Reply Brief in the Court of Appeals).

15 * * *

"Plaintiffs also offered two engineering reports concerning the Bonanza, prepared by Beech, and one engineering report prepared by the National Advisory Committee for Aeronautics against Atlantic (PX 22, PX 42, PX 72). Plaintiffs conceded that Atlantic had not received or seen these reports prior to the time of the Prashker accident and that they were not admissible on the claims against Atlantic based upon negligence. They offered the reports on the claim for breach of warranty (331a, 332a, 336a-339a). * * *"